Supreme Court, U.S.
FILED
FEB 21 1995

No. 94-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SCHOOL DISTRICT OF THE CITY OF LADUE, a public corporation, and BARBARA SACKS, CHARLES H. COBAUGH, JOYCE FOLLMAN, ROBERT MINKLER, ANN BOON, CHARLES McKENNA, ROBERT ADLER, NANCY ALBERT, LINDA SHER and JOLYNN WEINER,

Petitioners,

v.

THE GOOD NEWS/GOOD SPORTS CLUB, an unincorporated association, JORDAN HEIMBURGER, a minor, by his Next Friend, L. Corbett Heimburger, CHRISTOPHER HIRT, a minor, by his Next Friend, Peggy Hirt, DAVID HIRT, a minor, by his Next Friend, Peggy Hirt, COMFORT IBE, a minor, by her Next Friend, Afocha Ngozi Ibe, PEGGY HIRT, JOHN HIRT, SUSAN MALLORY, GEORGE MALLORY, LARRY TYCHSEN, DAWN HUFFMAN, GABOR CSENGODY, AFOCHA NGOZI IBE, KATHRYN HEIMBURGER and L. CORBETT HEIMBURGER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

TIMOTHY BELZ*
Belz Jones & Hickel P.C.
7777 Bonhomme, Suite 1710
St. Louis, MO 63105
314/863-0200

CARL HOWARD ESBECK
John K. Hulston Hall
Room 213
Columbia, MO 65211
314/882-3035

*Counsel of Record

Counsel for Respondents

February 17, 1995

BEST AVAILABLE COPY

4/RR

QUESTIONS PRESENTED

1. Is the case moot because the School Board unilaterally amended its policy on the use of facilities by its resolution of November 14, 1994, closing the forum to all community groups?

2. In following *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993), was the circuit court correct to conclude that there was viewpoint discrimination when: (i) the findings of fact by the district court indicated that the School Board adopted the use policy with the purpose of excluding the Club from the forum because of its religious perspective; and (ii) the use policy is facially discriminatory against religious speech?

3. Should the judgment be affirmed on one of the four alternative claims not taken up by the circuit court, whose judgment disposed of the appeal solely on the basis of viewpoint discrimination?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OBJECTION TO JURISDICTION	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	7
REASONS FOR DENYING THE WRIT	7
I. The Case Has Become Moot On Appeal	7
A. The November 14, 1994, Amendment Was Voluntary	8
B. No Exception To The Rule Of Mootness Is Applicable	10
C. Any Attempted Reservation Of The Right To Appellate Review Is Ineffective	11
II. The Decision Below Turns On Findings Of Fact Not Challenged Here, And There Is No Conflict With Prior Decisions Of This Court	14
A. The Controlling Law Is Found In *Lamb's Chapel*, And Its Principles Were Followed Below	14
1. In Defining "Viewpoint Neutrality," Religious Perspectives On A Given Topic Do Not Constitute A Separately Excludible Category Of Speech	15
2. The Topic Was Already Allowed Into The Forum	16

TABLE OF CONTENTS—Continued

Page

3. The School Board Had A Discriminatory Purpose: It Was Found To Have Adopted The Use Policy "Because Of" The Club's Religious Perspective 18

B. Because The Club's Program Is **Private** Speech—As Distinct From **Government** Speech—The Establishment Clause Cannot Justify The School Board's Discrimination Against Religious Views 23

CONCLUSION 28

APPENDIX I: School Board's action of November 14, 1994, amending the 1992 Use Policy

APPENDIX II: School Board counsels' letter of November 17, 1994, advising the District Court that the 1992 Use Policy had just been changed

TABLE OF AUTHORITIES

CASES: Page

Americans United v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) 25

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 22

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) 24

Board of Educ. of Kiryas Joel v. Grumet, 114 S. Ct. 2481 (1994) 24

California v. San Pablo & T. R. Co., 149 U.S. 308 (1893) 12

Christian Science Reading Room Jointly Maintained v. City & County of San Francisco, 784 F.2d 1010, *amended*, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) 14

Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993) 5, 19

City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) 22

Congregation Lubavitch v. City of Cincinnati, 997 F.2d 1160 (6th Cir. 1993) 14

Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788 (1985) 21, 23

Country Hills Christian Church v. Unified Sch. Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983) 25

Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676 (2d Cir. 1988) 24

TABLE OF AUTHORITIES—Continued

Page

DeFunis v. Odegaard, 416 U.S. 312 (1974) 10

Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980) 8

Doe v. Small, 964 F.2d 611 (7th Cir. 1992) 26

Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703 (4th Cir.), *cert. denied*, 114 S. Ct. 2166 (1994) 14

Fusari v. Steimberg, 419 U.S. 379 (1975) 1

Good News/Good Sports Club v. School Dist. of the City of Ladue, 28 F.3d 1501 (8th Cir. 1994) 4-8, 15-22, 26

Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist., 941 F.2d 45 (1st Cir. 1991) 24

Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990) 14, 24

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 24

Hedges v. Wauconda Community Unit Sch. Dist., 9 F.3d 1295 (7th Cir. 1993) 14, 25

Heitmuller v. Stokes, 256 U.S. 359 (1921) 8

ISKCON v. Andersen, 569 F.2d 1027 (8th Cir. 1978) 8

Karcher v. May, 484 U.S. 72 (1987) 8

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) 3-5, 7, 14-16, 19, 21-23

Lee v. Weisman, 112 S. Ct. 2649 (1992) 24

TABLE OF AUTHORITIES—Continued

	Page
Minneapolis Star & Tribune Co. v. Minnesota Comm'r, 460 U.S. 575 (1983)	23
Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983)	23
Personnel Administrator v. Feeney, 442 U.S. 256 (1979)	18
Quappe v. Endry, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd mem.*, 979 F.2d 851 (6th Cir. 1992)	26
Randall v. Pegan, 765 F. Supp. 793 (W.D.N.Y. 1991)	25
Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965)	25
Resnick v. East Brunswick Tp. Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978)	25
SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972)	12
Shumway v. Albany County Sch. Dist., 826 F. Supp. 1320 (D. Wyo. 1993)	24
Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991)	22
Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688 (2d Cir. 1991)	24
U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386 (1994)	8
United States v. Hamburg-American Co., 239 U.S. 466 (1916)	12
United States v. Oregon State Medical Soc., 343 U.S. 326 (1952)	10

TABLE OF AUTHORITIES—Continued

Page

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) 10

Verbena United Methodist Church v. Chilton County Bd. of Educ., 765 F. Supp. 704 (M.D. Ala. 1991) 25

Washington Market Co. v. District of Columbia, 137 U.S. 62 (1890) 8

Westside Community Schools Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) 3, 5, 23-25

Widmar v. Vincent, 454 U.S. 263 (1981) 5, 24

Williams v. Miller, 620 F.2d 199 (8th Cir. 1980) 8

Youth Opportunities Unlimited, Inc. v. Board of Pub. Educ. of the Sch. Dist. of Pittsburgh, 769 F. Supp. 1346 (W.D. Pa. 1991) 24-25

OTHER AUTHORITIES:

Rule 52, Federal Rules of Civil Procedure 17

Rule 54, Federal Rules of Civil Procedure 8

United States Constitution, Amendment I ..... passim

United States Constitution, Article III 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SCHOOL DISTRICT OF THE CITY OF LADUE, et al.,

Petitioners,

v.

THE GOOD NEWS/GOOD SPORTS CLUB, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OBJECTION TO JURISDICTION

On November 14, 1994, petitioners unilaterally amended the policy on the use of premises by closing the forum to all community groups. This eliminated the discriminatory treatment between Scouting groups and respondents' Club. This appeal is thereby moot.[1] *See infra* Reasons for Denying the Writ, Point I.

---

[1]Counsel is under a continuing duty to inform this Court of any development which may have mooted an appeal. *Fusari v. Steimberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).

STATEMENT OF THE CASE

The Policy On the Use of Premises that is the subject of this litigation was adopted by the petitioners ("School Board") on July 20, 1992 ("1992 Use Policy," referred to in the lower courts as "Amended Use Policy"). Its purpose was to exclude respondents ("Good News/Good Sports Club" or "Club") from school district facilities between 3:00 and 6:00 p.m. after the regular school day had ended while keeping the premises open during that time for Scouting and community athletic groups.

The 1992 Use Policy replaced a policy adopted in 1986. The first Club meeting under the 1986 Use Policy was held in December 1988, and monthly meetings continued without incident until the School Board's adoption of the 1992 Use Policy in July 1992. The Club's meetings occurred eight times per year (no summer meetings), and took place from approximately 3:05 p.m. to 3:55 p.m. at a junior-high building. Between 3:00 and 6:00 p.m., the forum was used approximately 300 times per year by Scouts and 700 times per year by athletic groups. The change in policies from 1986 to 1992 affected only the Club's eight meetings per year, leaving unaffected the approximately 1,000 uses by all others.

In its literature, the Club disclaimed any school sponsorship, and the Club required that its youth members obtain a signed parental consent form before attending. The Club is nondenominational and is open to all community youth.[2] The Club's program provided attendees with fun and constructive interaction with peers while building character from

---

[2]Contrary to what is implied at Petitioners' Brief 38, to join the Club one does not have to be a student enrolled in the Ladue School District. Rather, membership is drawn from all community youth. For example, one of the plaintiffs, Dr. Larry Tychsen, is the parent of a parochial school student.

the perspective of religious values. For example, during 1991-92, the last year the Club met in school facilities, the theme was friendship. Specific meetings focused on choosing friends, how to be a friend, resisting pressure from friends to use drugs, being friends with the opposite sex, being friends with one's parents, and being friends with God.

Both the 1986 and 1992 Use Policies pertain to outside community groups, *i.e.*, organizations having no official status with the school district.[3] This case is not about use of facilities during regular school hours.[4]

The Club filed its complaint on September 11, 1992, alleging that the 1992 Use Policy violated various rights under the Free Speech Clause and the Religion Clauses.[5] There was an expedited discovery schedule followed by a three-day trial, November 16-18, 1992. The United States District Court for the Eastern District of Missouri entered its opinion

---

[3]The 1992 Policy defines "community groups" as those engaging in "non-school related use of the District's school buildings and grounds . . . by residents and non-residents of the district, including not-for-profit organizations." Community organizations are contrasted with "school-sponsored and school-related activities." The Club is an unincorporated, voluntary organization which falls under the definition of community groups.

[4]Petitioners' contention that this case "extended" the law of *Westside Community Schools Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (upholding equal access for school-recognized student organizations), to the elementary school level (Petitioners' Brief 17, 40-41) is incorrect. The contention distorts the Establishment Clause issues present here, which, as in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993), concern community groups meeting during after-school hours.

[5]Contrary to the statement at Petitioners' Brief 8, a temporary restraining order was never requested. A motion for a preliminary injunction was requested, and it was later withdrawn in exchange for an early trial setting.

and judgment on March 2, 1993, upholding the constitutionality of the 1992 Use Policy.

The Club appealed raising several grounds for reversal. In an opinion handed down July 12, 1994,[6] the United States Court of Appeals for the Eighth Circuit reversed. Based on findings of fact that the School Board had adopted the 1992 Use Policy because of the Club's religious perspective,[7] and that the 1992 Use Policy on its face singled out religious speech for unfavorable treatment,[8] the circuit court concluded that the 1992 Use Policy had been adopted with the purpose of discriminating against the Club's viewpoint. For its principles of law, the circuit court followed *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S.Ct. 2141 (1993).[9]

6*Good News/Good Sports Club v. School Dist. of the City of Ladue*, 28 F.3d 1501 (8th Cir. 1994).

728 F.3d at 1507 ("The relevant inquiry was whether the [plaintiffs'] group was excluded **because of** its religious viewpoint, irrespective of whether the school district opposed that viewpoint.") (emphasis added).

828 F.3d at 1507 ("viewpoint discrimination appears on the face of the Amended Use Policy"); *id.* at 1507 n.12 ("The Amended Use Policy excludes only one viewpoint expressly: the religious viewpoint."); *compare id.* at 1509 ("Club's meetings comprised 8 of 993 total uses," yet only these eight uses were gerrymandered out of the forum by the 1992 Use Policy).

9Petitioners claim that in *Lamb's Chapel* this Court carefully limited its holding to the facts (Petitioners' Brief 38). They quote *Lamb's Chapel* as follows:

> The showing of the film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members.

113 S. Ct. at 2178. Without conceding talismanic significance to these particular facts for free-speech purposes, the quoted passage supports the Club rather than petitioners. Like the chapel, the Club does not meet during school hours, the Club is not sponsored by the school, and Club meetings are open to the community.

Because the circuit court reversed the trial court on the basis of viewpoint discrimination, it did not take up the Club's other arguments raised as alternative bases for reversal.[10]

The School Board filed a petition for rehearing and suggestion in support of rehearing *en banc*. Both were denied on September 29, 1994.

The School Board then filed a motion for stay of the mandate while it prepared the petition for a writ of certiorari. The Club opposed the stay because the school district

---

[10]These additional arguments, expressly noted but not decided by the circuit court, are:

1. In adopting the 1992 Use Policy, the School Board purposely targeted the Club for unfavorable treatment in violation of the Free Exercise Clause. 28 F.3d at 1503 n.3; *see Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993) (setting forth Free Exercise Clause standard for reviewing a policy whose object is adverse treatment of a religious group).

2. The 1992 Use Policy created a limited public forum for after-school meetings by youth opportunity organizations, thus content-based discrimination as to similar groups excluded from the forum can be justified only by a compelling governmental interest. 28 F.3d at 1505 n.6.

3. Even a content-neutral policy in a nonpublic forum must be reasonable. The policy unreasonably excludes religious youth groups. 28 F.3d at 1505 n.6. Because government must be neutral as to religion, it is not reasonable to single out private religious speech for detrimental treatment. *See Westside Community Schools Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

4. The 1992 Use Policy increases the entanglement between church and state; and the no-religion *proviso* clause in the Policy, when not enforced, results in the school preferring one religious viewpoint over another. 28 F.3d at 1510 n.19.

These additional four questions will have to be taken up should the petition for a writ of certiorari be granted.

would suffer no harm should the Club begin to hold its monthly meeting during non-school hours as it had from December 1988 to June 1992. The stay was denied on October 26, 1994. However, the circuit court directed that the mandate be delayed for ten days so that the School Board could seek a stay from the United States Supreme Court. The School Board never availed itself of the opportunity to seek a stay from this Court.

The circuit court's mandate was handed down on November 10, 1994. The mandate incorporated by reference the opinion of July 12, 1994, which states that "we reverse the judgment of the district court and remand to the district court **for a determination of a remedy consistent with this opinion**." 28 F.3d at 1511 (emphasis added).

Having been notified by the clerk that the mandate had come down, the School Board did not wait for "the district court [to] determin[e] a remedy consistent with [the circuit court's] opinion." Rather, on the heels of the November 10th mandate and without notifying the Club or the district court, on November 14, 1994, the School Board convened in closed session. At that meeting, the School Board unilaterally adopted a resolution amending the 1992 Use Policy. The November 14th action states, "the Use of Premises Policy adopted July 20, 1992, [is] **amended** in this Resolution" (Appendix I-2, attached hereto; emphasis added). By that amendment, the School Board closed the 3:00 to 6:00 p.m. after-school forum to all community groups.

The district court and the Club were notified of the November 14, 1994, action by legal counsels' letter to the district court dated November 17, 1994 (Appendix II, attached hereto). In the letter, the School Board's counsel twice admits that the 1992 "use of premises policy was **changed**" by the action of November 14th (Appendix II-1; emphasis added).

The mandate is still before the district court. However, following the issuance of a consent order of December 6, 1994, referencing petitioners' intent to file a petition for a writ, there has been no action on the mandate.

SUMMARY OF THE ARGUMENT

POINT I: While this appeal was pending, the case became moot through the unilateral action of petitioners. On November 14, 1994, the School Board amended the Use of Premises Policy adopted July 15, 1992, pertaining to community groups. The 1992 Use Policy has been the sole subject of this lawsuit. The November 14th action closed altogether the forum which had permitted community Scouting organizations and community athletic teams to use school facilities between 3:00 and 6:00 p.m. Accordingly, the forum to which the Club sought access on a nondiscriminatory basis is no longer open to any community organization.

POINT II: The circuit court's opinion is based on: (i) the findings of fact by the district court indicating that the School Board adopted the use policy with the purpose of excluding the Club from the forum because of the group's religious character; and (ii) the 1992 Use Policy's facial discrimination against religious speech. Accordingly, the decision below turned on findings specific to the circumstances of this case, not novel questions of law. The applicable principles of law are stated in this Court's unanimous decision in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993), and were followed below.

REASONS FOR DENYING THE WRIT

I. The Case Has Become Moot On Appeal.

The complaint of September 11, 1992, sought no damages, only prospective injunctive relief from the terms of the 1992 Use Policy. In its opinion of July 12, 1994, the circuit court's analysis was that the Club was entitled to a remedy because petitioners allowed Scouting programs to use facili-

ties during after-school hours. 28 F.3d at 1505-06. As a result of the November 14, 1994, amendment to the 1992 Use Policy, petitioners' discrimination against the Club *vis-á-vis* the Scouting groups no longer exists. By eliminating the forum altogether, the legal relationship between the disputing parties has been materially altered. Legislation amending the law under challenge normally renders a case moot.[11]

A. The November 14, 1994, Amendment Was Voluntary.

In its recitals, the November 14, 1994, amendment claims to "acknowledge and accommodate the Eighth Circuit Court's decision." Consequently, petitioners may argue that the November 14, 1994, action was involuntary, *i.e.*, that the School Board was only anticipating the injunction of the district court that inevitably would be forthcoming pursuant to the mandate. The School Board might argue it was merely conforming to the circuit court's opinion even before being ordered to do so by the district court.

Any such argument would be without merit. Petitioners' motion to stay the mandate had just been denied. The School Board thus found itself in a situation where there was

---

[11]This is not a case where mootness justifies vacatur of the judgment under review. Vacatur never applies when the party who would benefit by vacatur caused the mootness by its own actions. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390 (1994); *Karcher v. May*, 484 U.S. 72, 82-83 (1987). Any pending matters of costs and attorney fees under Rule 54(d), Fed. R. Civ. P., will not keep an appeal from being denied which is otherwise moot on the merits. *Heitmuller v. Stokes*, 256 U.S. 359, 362 (1921) (costs); *Washington Market Co. v. District of Columbia*, 137 U.S. 62 (1890) (costs); *Doe v. Marshall*, 622 F.2d 118, 120 (5th Cir. 1980) (attorney fees); *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980) (attorney fees); *ISKCON v. Andersen*, 569 F.2d 1027, 1028-29 (8th Cir. 1978) (attorney fees). Because costs and fees are ancillary to the merits, such awards were not intended by Congress to alter this Court's Article III jurisdiction.

only one way in which it could both: (i) comply with the circuit court's opinion of July 12, 1994; and (ii) otherwise keep intact the 1992 Use Policy. That way was to readmit the Club, pending the appeal, to the 3:00 to 6:00 p.m. after-school forum.

The School Board did not choose that simple, straightforward path, an approach that would have had the added benefit of not dislocating scores of other community groups.[12] Instead, the School Board closed the forum, thereby ousting the Scouting and athletic groups from their previously scheduled uses between 3:00 and 6:00 p.m. But this latter path necessarily meant that the Board had to amend the 1992 Use Policy. This choice was entirely voluntarily, not one forced upon the School Board by either the circuit court's mandate or the surrounding circumstances.[13] Thus, petitioners chose a path that mooted their appeal.

12The simple means of compliance with the mandate was to let the Club start meeting in the 3:00 to 6:00 p.m. forum (eight meetings per year), not to dislocate hundreds of people by ousting the Scouting programs (approximately 300 meetings per year) and the athletic teams (approximately 700 uses per year). Readmitting the Club was also the easy path. The Club had been meeting at a school building without incident for academic years 1988-89, 1989-90, 1990-91 and 1991-92. Instead, the School Board went out of its way to deny access to the Club, even if it meant amending the 1992 Use Policy and dislocating many other organizations.

13Implicit in the November 14, 1994, resolution is an admission of its voluntariness. A self-serving recital states that "the Board of Education has been advised by legal counsel that the school district has the right to close [the] non-public forum at this time" (Appendix I-2). The assertion is that petitioners have a legal **right** to close the forum, not that there is a legal **duty** to do so.

The adoption of the November 14, 1994, resolution was voluntary for the additional reason that the district court had not yet acted on the mandate. Indeed, there had been no time for the trial court to act. If the School

(footnote continued on following page)

B. No Exception To The Rule Of Mootness Is Applicable.

As a general rule, a discretionary appeal which has become moot while pending must be denied. There is an exception to this rule—not applicable here—when the government has voluntarily ceased from alleged illegal conduct with the design to deprive the appellate court of jurisdiction, leaving the government free to revert to its old ways once the court relinquishes jurisdiction. *See DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (*per curiam*). The rationale is that if local governments, when sued, are permitted to moot a case by unilateral cessation of their conduct, then government attorneys could manipulate when and before which court to defend on the merits.[14]

The voluntary-cessation exception is applicable to situations which are the reverse of this case, *i.e.*, if the School Board had won in the circuit court and then sought to preserve its victory by attempting to moot the Club's appeal.[15]

(footnote continued from previous page)

Board had waited for the district court to act on the mandate, it risked entry of an injunction that ordered the Club readmitted to the forum. Thus, the School Board moved quickly to close the forum before the district court had time to take up the matter.

14 *See United States v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.").

15 *See United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897):

> If the mere dissolution of the association worked an abatement of the [anti-trust] suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court

(footnote continued on following page)

In the instant case, it is not the government's attorneys who are trying to prevent the Court from taking jurisdiction by amending the Policy. Rather, it is the Club which is pointing out that the appeal is moot as a result of the School Board's abandoning the 1992 Use Policy. Accordingly, there is no need for concern that a party has taken action unilaterally so as to manipulate the general rule on mootness.

The voluntary-cessation exception is inapplicable for the additional reason that the School Board is not free to "revert to its old ways." If petitioners were to readopt the 1992 Use Policy, they would be defying the circuit court's opinion. The mandate is still in the hands of the district court and can be enforced. Thus, petitioners simply cannot "revert to their old ways" without disobeying the decision below as embodied in the mandate.

C. Any Attempted Reservation Of The Right To Appellate Review Is Ineffective.

Any attempt by the School Board to avoid mootness by characterizing their November 14, 1994, amendment as temporary "pending final resolution of this lawsuit" (*see* Petitioners' Brief 8 n.5) will be to no avail.

Any attempted "reservation of a right" to appellate review of the 1992 Use Policy, while at the same time aban-

---

(footnote continued from previous page)

> below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. . . . [A] trial has been had, and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit.

Id. at 309.

doning that policy, cannot keep the "case or controversy" alive. That would be duplicitous: changing the 1992 Use Policy, so the Club cannot meet, while still obtaining judicial review of a policy no longer in force. Similar artifices have been rejected. *See SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 406 (1972) (Dow Chemical's one-time concession to publish disputed proxy statement, made "without prejudice to future exclusion" of said proxy, was not sufficient to prevent mootness on appeal), and *United States v. Hamburg-American Co.*, 239 U.S. 466 (1916):

> "[T]he court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

Id. at 475-76 (quoting from *California v. San Pablo & T. R. Co.*, 149 U.S. 308, 314 (1893) (in action for unpaid taxes, deposit of allegedly owed taxes to the credit of the state, plus interest and costs, moots taxpayer's appeal)).

At this moment in time, the November 14, 1994, amendment is on the books until the School Board changes it, which by the terms of the resolution it is not required to do. It is wholly speculative what the School Board will do in the future, if anything. The resolution states that the School Board will have a meeting to decide what its next move will be when this case is finally disposed of, using these words:

> WHEREAS, the Board of Education will review and reconsider the use of Premises Policy adopted July 20,

> 1992, as amended in this Resolution immediately following the final disposition of the lawsuit . . . .

Appendix I-2. Constitutional questions that may arise in the future based on speculation as to what the School Board may do are not ripe for review. Courts do not render advisory opinions.

* * * * *

The School Board's intentions on November 14, 1994, were plain. The School Board's unilateral action was born of a desire to have it both ways, *i.e.*, prosecute its appeal while keeping the Club out of the after-school forum.

A stay of the mandate had just been denied. Petitioners were faced with having to readmit the Club to the forum. Theretofore they had fought zealously to keep the Club's religious views out of the forum. So they decided to preempt the judicial process and change the "rules of the game" by ousting some 300 Scout meetings and 700 athletic uses, rather than be ordered by the district court to readmit the Club. Instead of simply complying with the mandate, the School Board did away with the 1992 Use Policy which was the basis for this "case or controversy," and thereby mooted their appeal. Having created this most peculiar situation, petitioners must be required to live with it.[16] The petition for a writ of certiorari should be denied.

16The resolution of November 14, 1994, may constitute a new violation of the Club's legal rights. However, the scope of the complaint in this action, filed as it was in September 1992, obviously did not anticipate claims arising over two years later.

II. The Decision Below Turns On Findings Of Fact Not Challenged Here, And There Is No Conflict With Prior Decisions Of This Court.

This is a matter that turns on findings of fact unique to this case, not one presenting novel questions of law. The circuit court's decision is a straightforward application of this Court's unanimous decision in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993).[17]

A. The Controlling Law Is Found In *Lamb's Chapel*, And Its Principles Were Followed Below.

In *Lamb's Chapel*, because the school district had opened its property to various community uses during non-school hours, the chapel argued that the property had become a limited public forum. 113 S. Ct. at 2145. Rather than decide the broader question of whether the school had created a limited public forum, the Court ruled that even within the parameters of the uses officials did allow, the school had

---

[17]Similar cases concerning the unlawfulness of constricting a public forum to prevent access by a particular group are found in *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 706-07 (4th Cir.), *cert. denied*, 114 S. Ct. 2166 (1994) (facially discriminatory policy assessing churches higher rent to use school premises); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1164-65 (6th Cir. 1993) (facially neutral policy on private displays in public park held unconstitutional as city had discriminatory purpose adverse to Lubavitch); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1372-79 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990) (striking down amended school use policy that was adopted by school to gerrymander out religious organization). *See also, Hedges v. Wauconda Community Unit Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993) (concerning amended policy on literature distribution at school, parts of policy were neutral and other parts unconstitutional because discriminatory); *Christian Science Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, *amended*, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) (municipal airport's amended rental policy excluding religious tenants for reasons of remedying a perceived establishment-clause violation lacks rational basis).

violated the Free Speech Clause by engaging in viewpoint discrimination. *Id.* at 2147.

Similarly, the Eighth Circuit decided this case on the assumption, *arguendo*, that the 1992 Use Policy had not established a limited public forum but a nonpublic forum. 28 F.3d at 1505 n.6. And like the school in *Lamb's Chapel*, the School Board here was found to have adopted a Use Policy with the purpose of excluding the Club because of its religious point of view.

There are three issues that go to the heart of the School Board's petition. First, what does it mean to be "viewpoint neutral"? Second, do the findings below show that the subject matter of character and moral development in youth was a topic already allowed into the forum? And third, do the findings below show that petitioners had a discriminatory purpose?

1. In Defining "Viewpoint Neutrality," Religious Perspectives On A Given Topic Do Not Constitute A Separately Excludible Category Of Speech.

In *Lamb's Chapel*, the school's policy on the use of its facilities by community organizations excluded religious uses. The courts below, the Supreme Court reasoned, had been confused by what it meant for an access policy to be viewpoint neutral. 113 S. Ct. at 2147. The lower courts had held that the policy was viewpoint neutral because it did not discriminate among religions. Rather, all religious uses were treated the same: they were excluded. But the Supreme Court said that even if the use policy was evenhanded in its exclusion of religion, that was not responsive to the requirement of viewpoint neutrality:

> That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer

> the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint.

Id.

Just like the lower courts in *Lamb's Chapel*, petitioners harbor too narrow a conception of what it means to be neutral. As noted by the circuit court:

> [T]he *Lamb's Chapel* Court refused to cabin religious speech into a separate excludible speech category; rather, the Court adopted a more expansive view, recognizing that a religious perspective can constitute a separate viewpoint on a wide variety of *seemingly* secular subject matter.

28 F.3d at 1506-07 (emphasis in original; citing *Lamb's Chapel*, 113 S. Ct. at 2147). *See also*, 28 F.3d at 1506 n.8 (rejecting petitioners' argument "that the subject matter of the Club's speech is not already included in the forum because religious speech is a separate speech category," citing *Lamb's Chapel*, 113 S. Ct. at 2147).

2. The Topic Was Already Allowed Into The Forum.

In *Lamb's Chapel*, a topic that could be discussed in the forum was child development and family values. 113 S. Ct. at 2147. In the instant case, the topic allowed in the forum was moral and character development of youth. 28 F.3d at 1506. This determination was based on the findings of fact by the district court:

> When the district court analyzed whether the Scouts and Club were similarly situated, it determined that

> *. . . both the Club and the Scouting program are concerned with the moral development of youth . . . .*
>
> Dist. Ct. Op. at 21 . . . The district court also found that "[t]he purpose of Scout meetings is for the young persons involved to have fun, *to support the ideals of Scouting*, education, and *reinforcement of moral values.*" *Id.* at 20 . . .

Id. at 1505 (emphasis in original; quoting district court).

> [T]he "ideals of Scouting," which Scout meetings seek to support, involve exactly the same category of speech for which the Club seeks access: moral and character development.
>
> Further, the Amended Use Policy defines the scope of permissible speech from 3 to 6 p.m. by reference to the speech which may occur during the Scout meetings. The Scouts may engage, with the School District's blessing, in any speech relating to moral character and youth development. [citation to trial exhibit and *Lamb's Chapel* omitted] Because both the Club and the Scouts discuss issues relating to moral character and youth development, the subject matter for which the Club seeks access already is included under the Amended Use Policy.

Id. at 1506.

> Like the Club, the Scouts use their meetings as a forum for the purpose of developing moral and character development through skits, songs, and activities. The only difference is that the Club employs a religious perspective.

Id. at 1506 n.7.

Unless petitioners are prepared to argue that these findings are clearly erroneous (*see* Fed. R. Civ. P. 52(a)), it is an

established fact in this case that a subject matter already allowed into the forum was moral and character development of youth. The programs of both the Club and the several Scouting organizations addressed that topic.

3. The School Board Had A Discriminatory Purpose: It Was Found To Have Adopted The Use Policy "Because Of" The Club's Religious Perspective.

In an action for viewpoint discrimination, discriminatory purpose[18] is an element of the claim. What is not required—and where Petitioners' Brief 20-32 is therefore mistaken—is proof of invidious animus or hostility by the School Board toward the Club or its religious perspective.[19]

Petitioners refer to the circuit court's opinion (Petitioners' Brief 14), but they stop quoting too soon. The balance of the quoted passage demonstrates that the circuit court correctly read *Lamb's Chapel* as applying a test that examined whether

---

[18]As this Court held in the context of the Equal Protection Clause:

> "Discriminatory purpose," . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979). *See also, id.* at 279 nn.24 & 25.

[19]Petitioners claim that the circuit court adopted an "effects" test (Petitioners' Brief 14) and later a "causation" test (Petitioners' Brief 30). Both claims are incorrect. The circuit court used the "because of," not merely in spite of test, and it refused to require proof of hostility, opposition, or other invidious animus such as the School Board being "out to destroy the Club." 28 F.3d at 1507 and n.10.

the School Board adopted the Use Policy "because of," not merely in spite of, the Club's religious views:

> In *Lamb's Chapel*, the Supreme Court determined that the school access policy constituted impermissible viewpoint discrimination without any determination that the school officials opposed or disagreed with the religious perspective proposed. *See* 113 S. Ct. at 2147-48. **The relevant inquiry was whether the Lamb's Chapel group was excluded because of its religious viewpoint**, irrespective of whether the school district opposed that viewpoint.

28 F.3d at 1507 (emphasis added).[20]

The circuit court found that petitioners had the requisite discriminatory purpose ("because of," not merely in spite of, the Club's religious perspective). It relied upon: (i) the findings of fact by the trial court; and (ii) the Use Policy's facial discrimination against religious views in the forum.

---

[20]This test of the government's discriminatory purpose ("because of," not merely in spite of), is the same test used under the Free Exercise Clause to remedy hidden but nonetheless real discrimination on the basis of religion or a religious practice:

> [I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . , and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2227 (1993). It makes sense to use the same test of discriminatory purpose for both viewpoint discrimination and the Free Exercise Clause. Respondents raised a free-exercise claim on appeal, but the circuit court did not rule on that basis.

First, relying on findings by the district court, the circuit court noted:

> "[T]he citizen comments and complaints about the Club were the primary factor leading to the School Board's *examination* of the 1986 Use Policy *and eventual adoption* of the Amended Use Policy."

Id. (emphasis in original; quoting district court).

> The only complaints registered against the Club were in reference to the religious content of the Club's meetings.

Id.

> "[The Club] presented evidence, as did *[the School District]*, that criticism from some members of the community about the religious nature of the Club was the catalyst for amending the Policy."

Id. (emphasis in original; quoting district court). Note that the district court found here the reasons for **amending** the policy, not just **reexamining** it.

Summarizing the necessary implication from the foregoing findings of the district court, the circuit court concluded:

> We cannot say that the district court's finding that the primary reason that the School District adopted the Amended Use Policy was to exclude the Club from its premises from 3 to 6 p.m. on school days was clearly erroneous.

Id.

Second, the circuit court noted that the 1992 Use Policy was facially discriminatory against religious speech.[21] The

---

[21]Even if the 1992 Use Policy had been facially neutral as to religious expression, that alone would not have ended the inquiry as to discrimina-

(footnote continued on following page)

1992 Use Policy did not attempt to disguise its purpose of discriminating against the religious point of view. The Policy allowed various Scouting groups into the after-school forum:

> provided that such meetings shall be limited exclusively to the scout program and not include any speech or activity involving religion or religious beliefs.

The no-religion *proviso* is a window into the collective aim of the School Board as a body determined to keep religious speech out of the forum. Scouts could approach their youth programs from a myriad of perspectives save one: a religious point of view.[22] It is hard to imagine more damning evidence of the School Board's discriminatory purpose.

* * * * *

Petitioners' argument that invidious animus is required in a claim of viewpoint discrimination is contrary to *Lamb's Chapel*. There was no evidence in *Lamb's Chapel* that the school held ill will toward the chapel, or that the school directly opposed or disagreed with the view of family life in the film series that the chapel sought to exhibit. This is because the definition of viewpoint "is not limited to whether a speaker supports or opposes a particular resolution of an issue; rather, viewpoint is synonymous with per-

---

(footnote continued from previous page)

tory purpose. The federal government's policy in *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788 (1985), was viewpoint neutral on its face. Nonetheless, this Court remanded for additional findings on whether the government's actions were viewpoint discriminatory. *Id.* at 812-13.

22From the very text of the 1992 Use Policy, the circuit court found it evident that "[t]he Amended Use Policy excluded only one viewpoint expressly: the religious viewpoint. . . . Like *Lamb's Chapel*, the only perspective expressly excluded is the religious perspective." 28 F.3d at 1507 n.12.

spective." 28 F.3d at 1506 (citing *Lamb's Chapel*, 113 S. Ct. at 2147 (film series was excluded because the "presentation would have been from a religious perspective," not because school opposed Dr. James Dobson films)).[23]

Discriminatory purpose ("because of," not merely in spite of, the Club's religious perspective) does not imply invidious animus or censorial motive. This Court has repeatedly held that a "guilty mind" is not required in cases claiming discrimination against protected speech. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), summarizes the case law:

> True, there is no evidence that the city has acted with animus toward the ideas contained within respondents' publications, but just last Term we expressly rejected the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Simon & Schuster v. Members of New State Crime Victims Bd.*, 112 S. Ct. at 509. Regardless of the *mens rea* of the city, it has enacted a sweeping ban on the use of newsracks that distribute "commercial handbills," but not "newspapers."

113 S. Ct. at 1516.[24]

---

[23]Petitioners sought below to increase respondents' burden of proof by arguing that the Club failed to prove that the School Board "sought to destroy the Club." The circuit court rejected the argument as the false requirement that it was: "The Club never argued that the School District acted to destroy the Club . . . ; thus, far from abandoning this claim . . . the Club never raised it." 28 F.2d at 1507 n.10.

[24]*See also, Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991) (one challenging discriminatory speech restrictions "need adduce no evidence of an improper censorial motive"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) ("no evidence of an

(footnote continued on following page)

Evidence of vigorous opposition to a given message, or heated disagreement with the aims of a particular speaker, would, of course, be more than sufficient to satisfy the element of discriminatory purpose. But what is sufficient under the law is not the same as what is minimally required by the law. *Cornelius* and *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), do not hold that viewpoint discrimination requires proof of a malevolent intent to suppress the Club's views. Such a result would be at odds with this Court's line of cases culminating with *Lamb's Chapel*.

B. Because The Club's Program Is PRIVATE Speech—As Distinct From GOVERNMENT Speech—The Establishment Clause Cannot Justify The School Board's Discrimination Against Religious Views.

Respondents' expression is private religious speech. The Establishment Clause addresses only religious speech by government. As stated in *Westside Community Schools Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990):

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion,

---

(footnote continued from previous page)

improper censorial motive" is required); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r*, 460 U.S. 575, 592 (1983) ("[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment"; "[w]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment").

> which the Free Speech and Free Exercise Clauses protect.

Id. at 250 (emphasis in original).[25] The First Amendment, like the entire Bill of Rights, is a check upon government, not upon private citizens.[26]

---

[25]*See also, Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981) (noting that the Establishment Clause applies only to "speech, undertaken or approved by the State"); *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) (stressing that "[a] school official, the principal, decided that an invocation and a benediction should be given" and noted that "this is a choice attributable to the State"); *Board of Educ. of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring) ("The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. . . . The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools.").

[26]Moreover, this case is about private speech outside of normal school hours. It is not about speech during instructional time when there is an issue of control as to matters of curriculum (*see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)), or about student conduct during an official school event (*see Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)). But a public school's control over instruction and learning environment is not the issue here any more than it was the issue in *Widmar* and *Lamb's Chapel*.

Numerous lower courts have held that equal access is required for outside community groups requesting to meet during after-school hours. *See Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990) (school ordered to permit use of facility by religious group to have entertainer perform and discuss his faith); *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist.*, 941 F.2d 45 (1st Cir. 1991) (requiring that community religious organization be afforded use of school facilities); *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 694 (2d Cir. 1991) (school auditorium ordered to be made available to religious organization for worship and distribution of literature); *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676 (2d Cir. 1988) (school authorities' actions unlawful when denying to church the renewal of a permit to use school building during noninstructional hours); *Shumway v. Albany County Sch. Dist.*, 826 F. Supp. 1320 (D. Wyo. 1993) (holding that a public school violated the Free Speech Clause when it refused use of school facilities to hold a parent-sponsored baccalaureate ceremony); *Youth*

(footnote continued on following page)

But petitioners still feign worry that those among the public who learn that the Club is using facilities during non-school hours might not appreciate the distinction between private speech and government speech, and the public might mistakenly believe the Club's expression is endorsed by the School Board. This argument has rightly been dubbed the "ignoramus's veto." *See Americans United v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (privately funded menorah display in public forum does not violate First Amendment). As this Court said in *Mergens*, 496 U.S. at 250, it is not too much to expect of the public to understand that schools do not endorse everything they fail to censor. The circuit court rejected petitioners' contrived worry that they might be seen as endorsing religion by quoting with approval *Hedges v. Wauconda Community Unit Sch. Dist.*, 9 F.3d 1295, 1300 ("If pupils do not comprehend so simple a lesson [as the difference between public and private speech], then one wonders whether the Wauconda schools

---

(footnote continued from previous page)

Opportunities Unlimited, Inc. v. Board of Pub. Educ. of the Sch. Dist. of Pittsburgh, 769 F. Supp. 1346 (W.D. Pa. 1991) (summer religious program for youth granted access to school facilities); *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991) (equal access ordered for nondenominational religious group to hold private, voluntary baccalaureate service in school auditorium); *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991) (church must receive equal access to school auditorium to conduct private baccalaureate service as a matter of free exercise of religion); *Country Hills Christian Church v. Unified Sch. Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (school district required to offer its buildings to church for worship services on same basis as nonreligious groups); *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (students wishing to pray and read scriptures before school day begins and within five minutes after end of instructional day have First Amendment right to do so); *Resnick v. East Brunswick Tp. Bd. of Educ.*, 77 N.J. 88, 389 A.2d 944 (1978) (school district required as a matter of free exercise to allow facilities to be used by religious groups on same basis as secular groups).

can teach anything at all."). *See also, Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) ("If hecklers cannot silence political speech in a public forum, obtuse observers cannot silence religious speech in a public forum.").[27]

The evidence is uncontradicted that the Club did all it could to separate itself from the school district in the public's mind. *See* 28 F.3d at 1509 n.17. In its literature, the Club disclaimed any school sponsorship, and it required its youth members to obtain a signed parental consent form before attending. There was no evidence that anyone

---

[27]Petitioners' Brief 39 cites the district court opinion in *Quappe v. Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd mem.*, 979 F.2d 851 (6th Cir. 1992), but it is easily distinguished. Petitioners fail to give the citation to the full opinion of the Sixth Circuit. *See* 1992 WL 329536 (*per curiam*). The district court in *Quappe* expressly said that had it not been for the activities of an elementary classroom teacher, Mrs. Penwell, who founded the club and participated in its activities, the holding might differ. During the school day, Mrs. Penwell actively recruited students to attend the club, and had led prayers, distributed Bibles, and displayed religious posters on classroom walls. At the club meetings, she greeted the children at the start of the meeting, took attendance, and distributed study materials. 772 F. Supp. at 1006-07. Mrs. Penwell surely crossed the line from private speech to government-endorsed speech. Nevertheless, the district court limited its holding to the facts:

> [I]t is clear that determination of establishment clause cases is a fact-specific inquiry which may be altered by any of a myriad of factual permutations. . . . Were it not for the behavior of Mrs. Penwell, it is not certain that the [school officials] could have justified their content-based decision since the danger of impermissible state endorsement would have been greatly reduced. Should the dangers presented by Mrs. Penwell's activities abate at some future date, the risk of an appearance of state endorsement may correspondingly diminish. The Club should not be prevented in perpetuity from meeting [after school] in the absence of a showing that the interests asserted today will be unchanged tomorrow.

Id. at 1015-16. The Sixth Circuit affirmed in a one-page *per curiam* opinion, noting that the particular activities of Mrs. Penwell were crucial to the determination by the trial court.

thought the Club was an official function of the school.[28] Rather, the findings below indicate that some complaining parents knew full well that the religious Club was private. These parents wanted the School Board to oust the Club precisely because, in their opinion, religion is best kept private and thus does not belong in public buildings.

28In an effort which is at best obfuscatory, petitioners raise the matter of a former member of the School Board, Jane Cunningham, once being a leader of the Club. Petitioners' Brief 3, 4, 17 n.10. What they neglect to tell this Court is that the evidence was uncontested that Mrs. Cunningham was not involved with the Club after June 1991 and that she went off the Board in April 1992. This lawsuit is about the petitioners' adoption of the Use Policy on July 20, 1992, long after Mrs. Cunningham had stopped working with the Club as well as left her office on the Board. Neither the district court nor the circuit court found any link between Mrs. Cunningham and the Board's "need" to adopt the Policy.

The school district provided a "late bus" departing at 4:00 p.m. for students who had stayed after school. Contrary to the statement at Petitioners' Brief 4, the evidence was uncontradicted that students did not have to be involved in a school-sponsored activity to ride the late bus. Some of the youth attending Club meetings rode the late bus.

CONCLUSION

For each of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted this 17th day of February, 1995.

TIMOTHY BELZ*
Belz Jones & Hickel P.C.
7777 Bonhomme, Suite 1710
St. Louis, MO 63105
314/863-0200

CARL HOWARD ESBECK
John K. Hulston Hall
Room 213
Columbia, MO 65211
314/882-3035

**Counsel of Record*

Counsel for Respondents

Of Counsel:
ALEXIS I. CROW
The Rutherford Institute
Post Office Box 7482
Charlottesville, Virginia 22906
804/978-3888

APPENDIX I

RESOLUTION

WHEREAS, the Eighth Circuit Court of Appeals in a majority panel opinion has held that Ladue School District's Use of Premises Policy, adopted July 20, 1992, "violates the free speech clause of the First Amendment because it results in impermissible viewpoint discrimination"; and,

WHEREAS the School District will petition the Supreme Court of the United States to review the decision of the Eighth Circuit Court of Appeals; and,

WHEREAS the School District's request for a stay of the Eighth Circuit Court's mandate has been denied and, consequently, the School District must acknowledge and accommodate the Eighth Circuit Court's decision in the Good News/Good Sports Club lawsuit pending final disposition of that case; and,

WHEREAS in order to remove, pending final disposition of the lawsuit, the constitutional deficiency in the Use of Premises Policy as found by the Eighth Circuit Court of Appeals, to protect and promote the interest of students who remain at school after instructional time ends for school related activities, and to avoid public controversies regarding the use of school facilities by community groups during that time, the Ladue Board of Education has determined to close the non-public forum from 3:00 p.m. to 6:00 p.m. on school days which is now provided for scout programs and athletic groups in the Use of Premises Policy adopted July 20, 1992; and,

WHEREAS, the Board of Education has been advised by legal counsel that the school district has the right to close that non-public forum at this time; and,

WHEREAS, the Board of Education will review and reconsider the Use of Premises Policy adopted July 20, 1992, as amended in this Resolution immediately following the final disposition of the lawsuit "Good News/ Good Sports Club vs. School District of the City of Ladue."

NOW THEREFORE BE IT RESOLVED THAT pending final disposition of that lawsuit and subject to further orders of court, Ladue school facilities will not be available for use on school days by any community group, including scouts and athletic groups, until after 6:00 p.m. and that after that time on school days and all day on weekends and holidays religious, political, philosophical, civic and other community groups, including scouts and athletic groups, may have access to Ladue school facilities in accordance with the terms and conditions of the Use of Premises Policy adopted July 20, 1992, as amended by this Resolution; and,

BE IT FURTHER RESOLVED THAT all permits previously issued to scout and athletic groups for use of Ladue school facilities during the 3:00 p.m. to 6:00 p.m. period on school days subsequent to the date of this resolution are hereby canceled and revoked and the administration shall notify forthwith all such groups of the cancellation of their respective permits.

November 14, 1994

APPENDIX II

KOHN, SHANDS, ELBERT, GIANOULAKIS & GILJUM
ATTORNEYS AT LAW
ONE MERCANTILE CENTER, 24TH FLOOR
ST. LOUIS, MISSOURI 63101

November 17, 1994

The Honorable Edward L. Filippine
Judge
United States District Court for the
Eastern District of Missouri
United States Court and Custom House
Tucker Boulevard and Market Street
St. Louis, Missouri 63101

Re: *Good News Good Sports Club v. School District of the City of Ladue, et al., No.___*

Dear Judge Filippine:

On November 9, 1994, the United States Court of Appeals for the Eighth Circuit issued its mandate based on the court's majority panel opinion holding Ladue's use of premises policy unconstitutional. The Ladue Board of Education decided that pending disposition of its petition for writ of certiorari which defendants will file in the United States Supreme Court on or before December 28, 1994, its policy should be changed to eliminate the policy's constitutional deficiency found by the majority panel opinion.

Accordingly, at a meeting of the Ladue School Board on Monday, November 14, 1994, the use of premises policy was changed by closing school facilities to all community groups, including scouts and athletic groups, prior to 6:00 p.m. on school days. The limited public

forum for all religious, political, philosophical, civic and other community groups remains open after 6:00 p.m. on weekdays and all day on weekends and holidays. A copy of the Board's Resolution of November 14, 1994 is enclosed.

Very truly yours,

/s/ Robert McClintock
Robert McClintock by JG

/s/ John Gianoulakis
John Gianoulakis

cc: Mr. Carl Esbeck
Mr. Tim Belz